MAR 8 19
HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

—against—

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM M. FISCH,
Attorney for Petitioner,
No. 225 Broadway,
Borough of Manhattan,
City of New York.

ARTHUR HUTTER,
SAMUEL FRIEDLANDER,
Of Counsel.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 43 NEW CHAMBERS ST., N. Y.

INDEX

PAGE

Report of the Opinions of the Courts Below 2

Jurisdiction 2

Questions Presented 2

Statement of Facts 3

The Trial Judge, His Opinion Shows, Misapprehended the Evidence, Overlooked Some Testimony and Found Conflicts Where None Existed and Contradictions and Inconsistencies Where the Testimony Created None 8

Respondents' Position in the Court of Appeals 19

Basis of Jurisdiction of the United States District Court 22

Appendix A (Opinion) 35

Appendix B (Judgment) 39

POINTS:

I—When the testimony of witnesses, particularly disinterested witnesses, is not contradicted, when their credibility is not impeached and when it is not inherently improbable and when, if untrue, it is capable of contradiction, the trier of the facts may not disregard such testimony 23

INDEX—(Continued)

P

II—When a Trial Judge gives as ground for his decision that the evidence on behalf of one party "is in direct conflict with the evidence of the witnesses" for the other party, and there is in fact no such conflict, his judgment is palpably without support and should not be permitted to stand .....

III—There is no requirement in law that the finding of a Trial Judge "must be accepted" when that finding is palpably based on a misconception of the evidence, more particularly when it is not the result of "the opportunity of the Trial Court to judge of the credibility of witnesses." .....

IV—It is the obligation of a Court of Appeals reviewing a decision by a Court without a jury itself independently to consider whether on the entire record it is not left "with a definite and firm conviction that a mistake has been committed", whether such mistake be of law or of fact .....

Conclusion—For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this case .....

INDEX—(Continued)

TABLE OF CASES CITED

PAGE

Brady v. *Roosevelt S. S. Co.*, 217 U. S. 575..... 8

Chesapeake & Ohio Railway v. *Martin*, 283 U. S. 209, 216 .....2, 24

Dixon v. *United States*, 2 Cir. 219 F. (2) 10..... 8

Hanrahan v. *Pacific Transport Co.*, 262 F. 951..... 19
Hull v. *Littauer*, 162 N. Y. 569..... 25

Mason v. *United States*, 2 Cir. 177 F. (2) 352..... 8
McAllister v. *United States*, 348 U. S. 19, 20.....3, 28, 34
McCarty v. *United States*, 88 F. Supp. 251, affirmed 196 F. (2) 221.....8, 19

Petterson v. *Alaska S. S. Co.*, 9 Cir. 205 F. (2) 478, affirmed 347 U. S. 396..... 7
Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406..... 8

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85..... 7
State Farm Mutual Auto Insurance Co. v. *Bonacci*, 111 F. (2) 412 (8 Cir.).....28, 29, 34

The Admiral Peoples, 295 U. S. 649..... 8
The Shangho, 88 F. (2) 42, cert. denied, 301 U. S. 305 8

United States v. *United States Gypsum Co.*, 333 U. S. 364, 395 .....3, 28, 34

Wank v. *John P. Clark & Son*, 199 F. (2) 483..... 8

INDEX—(Continued)

OTHER AUTHORITIES CITED

PAG

Admiralty Act, 46 U. S. C. 741 .....

Restatement, Torts, 302(b) .....
Rules of Civil Procedure, Rule 52(a) 27, 29, 30, 3

Title 28, U. S. C. Sec. 1254 (1) .....

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

LORENTZ LUDVIGSEN,

Petitioner,

—against—

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Lorentz Ludvigsen, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the above entitled action, rendered January 3, 1956.

*Counsel for petitioner feel called upon to explain and justify the form and length of the petition. The nature of the case, the character of the trial judge's opinion and the perfunctory nature of the Court of Appeals review all place upon petitioner the heavy burden of establishing two negatives: (1) that the testimony on behalf of petitioner is not, as the District Judge stated, "in direct conflict with evidence of

Report of the Opinions of the Courts Below

The opinion of the District Judge is unreported. is printed in the Appendix to Appellant's (Petitioner' Brief in the Court of Appeals. The opinion of the Cou of Appeals is not as yet reported. It is printed "Appendix A" to this petition.

Jurisdiction

The opinion of the Court below was filed Januar 3, 1956. Judgment thereon was entered January 3, 195

Jurisdiction to review this decision is predicated upo Title 28 U. S. C. Sec. 1254(1).

Questions Presented

1. May a District Court Judge as a trier of the fact in rendering his decision disregard the uncontroverte evidence of disinterested witnesses not inherently im probable, whose credibility has not been impeached, whe the evidence, if untrue, is possible of contradiction?[1]

2. When a Trial Judge as a basis for his decisio states that the evidence in behalf of one party "is i direct conflict with the evidence of the witnesses fo

---

the witnesses of the respondent as to whether there was a slack in th ladder", that there in fact was no such evidence and petitioner's case uncontradicted; (2) that **there are no contradictions and inconsistencie in the testimony of the petitioner's witnesses,** as the District Judg stated, impairing their credibility. This neeessitates a detailed e amination of the evidence of all the witnesses as to the material issu in the case; also a detailed and painstaking analysis of the Distri Judge's opinion as to the alleged contradictions and inconsistencies.

1. Chesapeake & Ohio Railway v. Martin, 283 U. S. 209, 216.

the other party", and there is in fact no such conflict, is not the judgment so rendered wholly without support in the record?

3. When the decision of the Trial Judge on the facts is palpably based on misconceptions of the evidence and on unwarranted inferences therefrom, apparent on the face of the record and not dependent on his judgment as to the credibility of the witnesses based on their appearance and manner, is it the law that it "must be accepted" by the Court of Appeals?[2]

4. Is it not the obligation of the Court of Appeals reviewing a decision by a court without a jury, independently to consider whether on the entire evidence it is not left "with a definite and firm conviction that a mistake has been committed"[3], whether the mistake be of fact or of law?

Statement of Facts

On July 19, 1950, Lorentz Ludvigsen, the petitioner, Captain of the lighter owned by the Lehigh Valley Railroad, brought his vessel loaded with automobiles from Jersey City, N. J. to Brooklyn, N. Y., for the purpose of transferring his cargo to the *Horda*, moored at Pier 34, East River, owned by Mowinckels Rederi, one of the respondents. When he arrived there at about 3:30 P. M. he found an Erie Railroad lighter, known as the *Erie* 114,

---

2. The Court of Appeals in this case wrote: "This crucial finding of the Trial Court, so carefully accommodated to the testimony as presented, **must be accepted** as being far from 'clearly erroneous'. McAllister v. United States, 348 U. S. 19, 20." (Emphasis supplied.)

3. United States v. United States Gypsum Co., 333 U. S. 364, 395; McAllister v. United States, 348 U. S. 19, 20.

moored alongside the *Horda,* part of whose cargo had earlier in the day been transferred to the *Horda* by stevedores in the employ of Commercial Stevedoring Co., the other respondent. The stevedores had stopped work on the *Erie* for the day at about 2:15 P. M. They were due to return the following day to complete the unloading.

Petitioner had with him the papers relating to his cargo, which he was required to deliver to the office of the ship owner on the pier. The only way he could get there from his vessel was to board the *Horda* and from there proceed to the pier. Suspended from the *Horda* was a Jacob's ladder with broad, flat wooden rungs and sides of rope. The ladder had been used by the stevedore's men in going to and from the *Erie* to the *Horda.* The distances from the deck of the *Erie* to the top of the *Horda's* rail was about twenty feet. The ladder, considerably longer than this distance, had, as the testimony showed, been partly pulled up by the stevedore's men to prevent it being abraided by rubbing between the sides of the two vessels. Its bottom rung was, at the time petitioner began his ascent, about a foot above the deck of the *Erie.*

Petitioner had been a seaman for some thirty years, for thirteen of them, a captain. He was fully familiar with ladders of this type, had in fact used them, as he testified, "Many, many, many times" (R. 15). When he got to the ladder, he put his hand on the two sides and pulled.[4] Finding it held, he mounted it. He had

---

4. In a pre-trial deposition, petitioner had been asked whether he had tested the ladder. He said: "I didn't test it. I just went up on the ladder like I always do" (R. 30). At the trial, he explained that to him "testing" had a special meaning: "Testing means first go up—

nearly reached its top, "when suddenly the ladder came down" a distance of about five feet and then came to a stop (R. 18). The fall of the ladder caused petitioner to lose his hold. He fell back to the *Erie*, striking it with his head, his back and buttocks. He was immediately rendered unconscious and, as later examination disclosed, suffered three fractured vertebrae, with consequences some of which, as his doctor testified he will bear for the rest of his life.[5]

Within a few minutes, a New York City police officer operating a radio car, arrived at the scene. After interviewing petitioner, he made his official report, received in evidence without objection, which stated, "The subject claimed the slack in the ladder caused him to fall" (R. 273).

The ladder was the property of the ship owner. It had been borrowed by the stevedore, as is customary. It was twenty-five to thirty feet long and tied to the padeyes by means of extension ropes. The ladder was some

---

go up a couple of steps and then go down. That would be the test of it so far as I know" (R. 28). What he did do, putting his hands as far as they could go, and pulled down, he called "trying the ladder". That he in fact "tried" the ladder in the manner he testified is corroborated by the testimony of two disinterested witnesses, Rojahan and Forwalk, whose testimony is given in the text **and is disputed by no one.**

5. His body was in a cast from the time of the accident in July, 1950 until February, 1951; thereafter, he wore a steel brace "with three steel straps on the side and on the back and then clothing in the front about six or seven bands" (R. 20). The brace extended from his shoulders to the bottom of his back. He wore cast or brace continuously for one and a half to two years. Thereafter he wore the brace when the weather was bad or he had hard work to do. His physician testified "he should wear the brace because it is a painful condition and that brace will help alleviate the pain" (R. 95). He was of the opinion that petitioner would need to wear the brace under the indicated conditions as long as he lives (R. 87).

five feet or so longer than the distance between the deck of the *Erie* and the top of the *Horda's* rail. It was quite heavy—too heavy for one man to carry. At about 2:15 o'clock, two of the stevedores, having completed their work on the *Erie* for the day and intending to return the following day, had pulled up the ladder so that its bottom rung was about a foot above the deck of the *Erie* (R. 108). This was done, as was explained by one of the stevedore's men (R. 178-179) and by the third mate of the *Horda* (R. 245-246), to prevent its being damaged by chafing between the two vessels.

The pulling up of the ladder was testified to by Edgar Rojahan, a scow captain for twenty years, engaged at the time in loading copper, at the pier. He saw two of the stevedores standing on the *Horda*, each holding one of its sides, pulling it up a distance of about four or five feet inside and laying it in board the rail of the *Horda*. Before the ladder had been pulled up, a "whole bunch" of it had been lying on the deck of the *Erie* to a height of about two feet (R. 63-64).

Rojahan saw petitioner go up the ladder. Before he started his ascent, he gave the ladder "a jerk or shake" (R. 49). Petitioner had just about reached the rail of the *Horda* when "the whole ladder fall down by the slack", petitioner losing his grip and falling on to the *Erie* (R. 50). About four or five feet of the slack came down as petitioner fell (R. 67).

William Forwalk, a captain of the *Erie* for thirty years, also testifying for petitioner, estimated the distance between the deck of the *Erie* and the top of the *Horda's* rail at twenty to twenty-five feet. He saw petitioner mounting the ladder. Before he started, "He grasped the ladder and shivered it and pulled at it and then he went up. He was almost at the top, and I see

the ladder fall, and the man came down and struck the deck of the *Erie* 114, a cleat of the deck" (R. 106). Only part of the ladder fell. The rest of it retained its position, hanging along the side of the *Horda.*

Before the accident, the bottom of the ladder had been about a foot above the deck of the *Erie.* Following the accident, it was about four feet below (R. 108).

The time they left the *Erie* and hence, the time the ladder was pulled up, is variously fixed by the stevedores, at 2 P. M. (R. 161) by Puglia, one of them, and at 2:30 or 2:35 P. M. (R. 139) by Marino, another. The time of the accident is fixed at about 3:30 P. M. (R. 274). There was thus a lapse of between an hour and an hour and a half between the pulling up of the ladder and its placement on the *Horda* and petitioner's accident. During this time, an inspection of the ship and its appurtenances by its officers, which they customarily make (R. 233, 234, 237), to see that the ship, and its appurtenances, including any ladder (R. 237), are in good order, should have disclosed the condition of the ladder. Instead, Johannessen, its third mate, the only one of the ship's officers called, testified he knew nothing about the condition of the ladder, "didn't notice it * * *. I didn't concern myself about the ladder at the time" (R. 253).

There appears to be no question that upon the facts as thus testified, on well-established principles, following the decisions of this Court, both the respondent ship owner[6] and the respondent Commercial, the Stevedore,[7]

---

6. The liability of the ship owner is based on its obligation to provide a seaworthy ship and appliances to any one rightfully on board ship. Seas Shipping Co. v. Sieracki, 328 U. S. 85; Petterson v. Alaska S. S. Co., 9 Cir., 205 F. (2) 478, affirmed 347 U. S. 396;

are liable. The authorities cited by petitioner in the Court of Appeals to establish such liability, were not questioned by either respondent or by the Court.

The Trial Judge, His Opinion Shows, Misapprehended the Evidence, Overlooked Some Testimony and Found Conflicts Where None Existed and Contradictions and Inconsistencies Where the Testimony Created None.

It should be made clear that in questioning the findings and conclusions of the Trial Judge, the contention of petitioner is not that he erred in accepting the testimony of one set of witnesses rather than that of another. *His contention is that the Trial Judge refused to accept the testimony of petitioner and his two disinterested witnesses*

Pope & Talbot Inc. v. Hawn, 346 U. S. 406. The ship owner is held to have the "non-delegable duty to use care to make the ship seaworthy, as well as her appliances." Dixon v. United States, 2 Cir. 219 F. (2) 10. Comprehended in this duty is the owner's obligation to provide to a person boarding a ship in order to perform work on it, a safe method to board and to leave it. Mason v. United States, 2 Cir., 177 F. (2) 352. A ladder owned by a ship when so used is deemed part of the ship. The Admiral Peoples, 295 U. S. 649; Brady v. Roosevelt S. S. Co., 217 U. S. 575; The Shangho, 88 F. (2) 42, cert. denied 301 U. S. 305. Equally with the obligation to supply a safe ladder is the ship's obligation to have the ladder maintained in that condition. McCarty v. United States, 88 F. Supp. 254, affirmed 196 F. (2) 221. In the last cited case the Court said: "I can perceive no difference in principle between a ladder which became unfit during usage because of wear and tear, and one which became unfit because its lashing was removed, by cutting or otherwise. Either condition would have been revealed on adequate inspection and thus the cause narrows down to the showing in that respect."

7. As to the stevedore, having created the condition it is liable on the principle stated in Wank v. John P. Clark & Son, 199 F. (2) 483: "An act may be negligent which creates a situation that involves an unreasonable risk to another because of the expectable action of the other. Restatement, Torts, 302(b)."

which was uncontroverted, and rested his decision on this wholly unfounded statement (Court of Appeals Appendix to Appellant's Brief, p. 8):

> "The testimony of the libelant's witnesses is in direct conflict with the evidence of witnesses of the respondent as to whether there was a slack in the ladder."

There is no evidence by either respondent or by any one else which conflicts in any way with that of petitioner on any material issue and only the most trivial and inconsequential ones as to immaterial questions, as will be shown hereafter.

The District Judge, in his opinion (*ibid*, p. 5), states:

> "The principal issue is whether there was a slack in the ladder, caused by pulling the upper portion of it up on to the deck."

A careful examination of the record from cover to cover will show conclusively that neither the existence of slack in the ladder, nor the fact that before it was pulled up the slack had been piled on the deck of the *Erie* to a height of two feet, nor any facts from which its existence necessarily had to be inferred, such as the length of the ladder with relation to the distance between the deck of the *Erie* and the top of the *Horda* rail; nor the position of the ladder, its lower end one foot above the deck of the *Erie* before petitioner's fall and four feet below it afterwards, was disputed by any witness for either respondent. The testimony of all five witnesses called by them, who were present at or near the scene at the time of the accident or immediately prior to it or thereafter, consists entirely of disclaimers of any knowledge.

Puglia, one of the stevedores, did not remember whether the bottom of the ladder was above or below the lighter (R. 162). Marino, another stevedore, who put the ladder overside on to the *Erie*, was unable to remember whether it was piled up on the deck of the lighter (R. 167) or how many of its rungs were lying on the deck (R. 172). Romano, hatch boss, employed by Commercial, who testified to seeing petitioner lying on the deck of the lighter after his fall, "did not take notice of the ladder" (R. 182). Grillo, hatch foreman, who had rigged the ladder on to the *Horda*, could not tell "if there was one or two rungs in the lighter or more than one or two, or it just reached the lighter" (R. 137). He could not "remember" whether he allowed any slack in the ladder or pulled it up and likewise could not recall whether he ever saw any slack in the ladder (R. 140). Johannessen, third mate of the *Horda*, saw the ladder after the accident. All he could say as to its position is that "It was not *in* the water." Asked how far out of the water it was, he said, "I did not measure it. * * * it was some feet from the water" (R. 262). Questioned about the condition of the ladder after the longshoremen had left the lighter, whether he saw anything wrong with it, he said, "I didn't notice anything * * *. I didn't concern about the ladder at the time." Asked specifically whether he noticed "a lot of slack, four or five feet of slack, piled up on the deck on the inside of the rail", he responded, "No, *I didn't notice*" (R. 253). He was no better informed when questioned about the time when the stevedores were working on the *Erie*, whether there were two and a half or three feet of the ladder piled on the deck. He did not even "notice" whether the ladder was between the ship and the lighter (R. 245).

Of equal significance with the disclaimer of all knowledge on the part of the respondents' witnesses who *were*

called, as to the main issue of the case—the existence of slack in the ladder—is the failure of respondents to call any of the nineteen other men[8] who were on one or both of the vessels involved at the time of the accident or immediately preceding or following it, and the failure to account for not calling them.

Following the Trial Judge's statement, as has been demonstrated, wholly unsupported in the record, about the conflict in the testimony, he proceeds in his opinion to justify his decision against petitioner by additional reasons for not accepting his testimony and that of his two disinterested witnesses. These, upon analysis, will be found also based on misapprehensions as to some testimony, on overlooking other testimony and on unwarranted conclusions and inferences:

1. Speaking of the witness Rojahan, the Judge wrote that "he reiterated that the *Erie* was light at the time of the accident, which was not the fact" (Opinion, p. 9). The testimony shows that the stevedores, eight of them, had been working on the *Erie* from 10:15 A. M. to 2:15 P. M., with an hour off for lunch (R. 147-8). Forwalk, its captain, testified that ten or eleven pieces of freight had been removed when they stopped working for the day (R. 111), the weights of the pieces varying from half a ton to three tons each (R. 104). The freeboard of the

8. There were eight men working on board the **Erie**. Of these, only two, Puglia and Marino, were called. There were thirteen men "eight hold men and four deck men and the hatch boss" aboard the **Horda** at the time, as Marino testified (R. 179). Some of these men must have been able to testify as to whether, as asserted by petitioner and his witnesses, the ladder at one time lay bunched on the **Erie** and later, after it had been pulled up, whether the slack lay on the deck of the **Horda** and whether and how it had been secured.

Erie relieved of this freight, had at the time of the accident been increased by a foot (R. 114).

2. The Judge said (Opinion, p. 9) that Rojahan testified that the ladder had been bunched on the *Erie* before it had been pulled up, which, he said, Forwalk contradicted. This is another error. Forwalk did not contradict that testimony. His actual testimony is (R. 115):

> "Q. Now, from 1:30 on up until the man started to walk up the Jacobs ladder, the man who fell, did you at any time see the Jacobs ladder piled up on the deck of your lighter to a height of two and a half to three feet?
> A. No, *I don't remember.*"

3. The Judge then calls attention (Opinion, p. 9) to a contradiction between petitioner and Rojahan on the question whether when petitioner came out of his cabin he was holding a paper in his hand or had it in his pocket. This is the only one of the contradictions cited by the Judge which survives examination. When it is noted that this was not only wholly immaterial, but also most trivial, that the testimony as to this unimportant fact was given by the two men some five years after the incident, the matter will be seen in its proper prospective.

4. Rojahan, the Judge wrote (*ibid*), was vague about the time of the occurrence. So, for that matter, was every one else. No reason suggests itself why the exact time of the various incidents to which he testified, should have impressed itself on his memory. In these circumstances, vagueness as to time is the mark of an honest witness and precision, of a dishonest one.

5. The Judge makes a point of the fact that Rojahan did not give his name to the police officer, although "he was present when he arrived" (*ibid*, p. 9). The police officer testified that when he came on board the vessel on which petitioner was lying after the injury, he found only one other man there and that was Forwalk (R. 278).

6. Referring to Forwalk, the Judge dismisses his testimony as "not convincing". He explains this in the following words (Opinion, p. 9):

> "He was very exact as to the position of the bottom of the ladder before and after the accident, also stating that the libelant shivered and pulled the ladder before ascending it. Yet, on cross examination, he admitted that earlier in the day the bottom of the ladder was four or five feet below the deck of his lighter, between the ship and the lighter, similar to its position after the accident, as he observed it."

This conclusion seems based on the following testimony (R. 109):

> "Q. Now, when the Jacobs ladder was put out I believe you said that there was about four or five feet below the deck line of the lighter.
>
> A. Well, it rolled down, struck the lighter, and the Jacobs ladder fell down between the ship so that it extended about four or five feet down.
>
> Q. So that when the Jacobs ladder was put out it extended down between the Erie 114 and the side of the ship?

A. Yes.

Q. And it extended down then a distance of about four or five feet?

A. That is right."

It is apparent that the witness misunderstood the purport of the question. He thought, as his first answer makes clear, he was being interrogated about the position of the ladder after the accident, whereas the questioner was inquiring about its position when it was originally laid down.

7. The Judge next said as to Forwalk (Opinion, p. 9), "if he was aware of the slack in the ladder, there is no evidence that he warned the libelant of it."

There is nothing in the record to show that Forwalk knew of the slack. As a matter of fact, from his position on the lighter he could not possibly have known that the ladder, inboard the ship, some twenty feet higher, completely outside the range of his vision, was not secured until after petitioner's fall.

8. The Judge said (*ibid*) that "It is important to note that the libelant did not even see this witness (Forwalk) on the deck at the time." There is nothing in the record to show whether he did or not. In any event, the implication of the remark is obscure. Is it that Forwalk, Captain of the *Erie,* was not on board his own vessel while his cargo was being discharged? Why should petitioner, intent on getting aboard the *Horda,* have noticed Forwalk?

9. The opinion contains the following (p. 10):

"The testimony of the stevedore is more be-

lievable. Its employees were not positive about details and were frank to admit what they did not know or remember. Their testimony fully supports their contentions that they had nothing to do with the creation of slack in the ladder."

The fact that these witnesses did not themselves create the slack may be accepted. So also may the Judge's compliment on their frankness in truthfully saying that they did not know or remember whether the slack existed or the position of the ladder with relation to the deck of the *Erie* before and after the accident. But assuredly, the fact that they did not know or remember these crucial facts does not serve to establish what the parties who called them may have hoped to establish by their testimony. Nor does it serve to explain the failure of respondents to call any of the nineteen other men who might have been in a position to testify on the vital issue in the case.[9]

10. The Judge then wrote (p. 10) that "no apparent reason existed for pulling up a portion of it (the ladder) and piling it on the deck of the vessel." The Judge overlooked the testimony of two different witnesses who gave the explanation for that. This was that the ladder if left hanging between the ships would likely be damaged by abrasion (R. 178-179; 245-246).

11. The Judge found Forwalk's testimony "that the bottom of the ladder extended below the deck of the lighter" not plausible. This refers presumably to the testimony that after the accident the ladder hung four feet below the deckline of the *Erie* (R. 108). Why that

9. See ante, Note 8, p. 11.

is not plausible is difficult to understand. It seems obvious that that is what was bound to happen under the given circumstances, that is, the ladder falling as a result of petitioner's mounting it with five feet of its length lying unsecured or inadequately secured.

12. The Judge was puzzled as to why "the stevedore's employees were so conscientious about avoiding damage to the lower part of the ladder by partly putting it up on the deck of the vessel, especially in that the ladder did not belong to the stevedore" (Opinion, p. 10). The ladder had been borrowed from the ship, with the permission of the ship officers, as claimed by Marino (R. 166), or without such permission, as testified by Johannessen (R. 231), though admittedly such borrowing was customary and permission would have been given (R. 232). In either event, it was the obligation of the stevedore to return it in good condition. Moreover, the stevedore's men had not finished unloading the *Erie* and were due to return the following day (R. 178-9). They partly pulled up the ladder, to avoid its being damaged, because they were through with it for the day, and left it suspended from the *Horda,* because they were going to use it the next day to save themselves the trouble of putting it back, unmindful of the possibility that some one else might use it, as petitioner actually did, and of the danger involved.

13. "If those employees", the Judge continued (Opinion, p. 10), "had any interest in preserving the ladder, it is more likely that they would have removed it from the side of the vessel and returned it to the ship owner for it had served its purpose for that day." The point the Judge seeks to make is not clear. Is he seeking to argue that the ladder was not left there? *The fact*

hat the ladder was in fact left there over night is es-
ıblished by the testimony of Grillo, one of the stevedore's
ıen, "We left that ship and we left the ladder there"
R. 39), *that is, hanging suspended from the HORDA*
o the ERIE.

14. The opinion then proceeds (p. 10):

> "Libelant does not claim that the upper portion of the ladder which was pulled up and laid on the vessel's deck, was lashed to that deck. Under these circumstances, it would seem that the slack would have been taken up as soon as the libelant pulled on the bottom of the ladder, and, surely so, as soon as he placed his full weight upon it when he first stepped upon the bottom rung of the ladder."

Petitioner was, of course, not in a position to testify vhether the slack of the ladder was or was not lashed o the deck. Nor were his witnesses. It was respond-ents' obligation in the circumstances to make the slack as safe as the ladder itself had been, capable of with-standing any pressure to which it might be subjected, by lashing it or otherwise securing it. That the upper portion of the ladder was not adequately secured is es-tablished directly by the testimony of petitioner, Rojahan and Forwalk and as an inevitable inference from what happened to petitioner.

With the facts in mind, the reason for the ladder's fall after petitioner had nearly completed his ascent becomes readily understandable. Five feet of the ladder, the excess of its length over the distance between the rail of the *Horda* and the deck of the *Erie*, was lying on the *Horda*, either held in place solely by its own

weight or inadequately secured. (The length of the part of the ladder lying on the *Horda* is fixed by Rojahan's testimony that four or five feet of the ladder had been pulled up (R. 48) and by Forwalk's testimony (R. 108) that before petitioner fell, its bottom was a foot above the *Erie's* deck and that after the fall it was four feet below.) Neither petitioner nor either of his witnesses was in a position to say which was the case. Respondents' employees who placed it there and who saw it were not called. First, there was the initial pull of the weight of petitioner's body. Increasing in intensity as he went further and further up the ladder. Then also the pull was continuous for the entire time it took him to get near the top. Moreover, as he put first one foot on one side of the ladder then the second foot on the other side, with the weight of his body now pressing on one side, now on the other, first one side then the other side of the ladder's slack loosened. The slack, thus subjected to the cumulative effect of continuous, prolonged and progressively increased pressure, was dislodged though it withstood the pressure of his first steps on the ladder. Both Courts—the Court of Appeals in its opinion raised the same question—overlooked these elementary and self-evident considerations.

15. The Judge dismissed as "a self-serving declaration" the police officer's report of the accident, received in evidence without objection, in which it was said, "The subject claims the slack in the ladder caused him to fall", with the added comment, "usually, one injured in an accident considers himself blameless" (Opinion, p. 11). The declaration made so soon after the accident, while petitioner was lying in agony, even if not within the strict letter of the *res gestae* rule, certainly comes within its spirit. He could hardly have been thinking

the time of a possible lawsuit, much less of the aring on it of the condition of the ladder. Nor is the ggestion that petitioner was seeking to exculpate him-lf from blame, justification for rejecting the statement. he issue in the case is the existence of the slack in the dder. Petitioner's reference to the slack is a statement fact, though coupled with his conclusion as to the cause r his plight. The latter may perhaps be rejected as conclusion; the former has probative value.

16. The Judge cited two cases in his opinion (p. 1), apparently in support of the principle that "assuming at there was a condition of slack in the ladder lasting out an hour, it would not render the vessel unsea-orthy". *Hanrahan* v. *Pacific Transport Co.*, 262 F. 51, has no relevancy to this case at all. *McCarty* v. *nited States*, 88 F. Supp. 251, the other case cited, as no application in so far as the liability of the steve-ore is concerned in view of the fact that the condition omplained of was here created by the stevedore's men, hich was not the situation in the *McCarty* case.[10]

Respondents' Position in the Court of Appeals

Neither respondent was able any more than was the District Judge to point to any testimony by their witnesses ontradicting petitioner's testimony as to the existence f the slack or as to the physical facts, such as the osition of the ladder with relation to the *Erie* before nd after the accident, which by inevitable inference points o the existence of the slack.

---

10. To the extent that the ship owner is concerned, the case ctually supports petitioner's position. The lapse of time between he creation of the condition and the accident was much greater in he case at bar than in the McCarty case.

Respondent Rederi meets the problem of upholdin the judgment in face of this situation by calling attentio to a minor contradiction between Rojahan and Marin overlooked by the District Judge[11] and by an attack o Rojahan credibility[12], following in part the line taken b the Trial Judge.

---

11. Rojahan had testified the ladder was pulled up by the tw stevedores who had last come up the ladder from the **Erie** (R. 61 Marino, one of the stevedores, testified that he was last man off th **Erie** and that **he** had not pulled up the ladder. To that exte there is a contradiction. However, the only other stevedore the gang that worked on the **Erie**, Puglia, who likewise testifie that he did not pull up the ladder, was not one of the last two leave the **Erie**. No other member of the gang testified. Even a suming that Marino's testimony is correct—there is no finding as that—the most it proves is that Rojahan was mistaken and tha one of the two men who pulled up the ladder was not one of th last two to leave the **Erie**. In view of the situation, that mistak if mistake it was, is wholly understandable. It is easy to see ho in the confusion with eight stevedores, all strangers to him, climbin the ladder in succession, and with thirteen other men on the Hord all milling about, Rojahan, recogizing one of the men as havin just left the **Erie**, assumed that the other man had likewise done s Most significant in this connection is respondent's failure to call th other men who worked on the **Erie** as well as the men from th **Horda** to establish that none of them had pulled up the ladder.

12. It is interesting, in light of this respondent's attack upo Rojahan's credibility, to contrast his position with that taken by hi before the Trial Judge. In a post-trial memorandum, signed by th same attorneys who signed the brief in the Court of Appeals, Rojahan' testimony is unequivocally accepted, as appears from the followin excerpts from that brief:

> "The accident was caused by the ladder having bee pulled up by the longshoreman when he left the lighter."
>
> * * * *
>
> "The testimony of Rojahan points clearly to the fac that the ladder was pulled up by the last two longshoremer up the ladder shortly before the accident, and that befor this ladder was pulled up the foot of it was lying bunche

Realizing that the unquestioned and unquestionable fact of the accident to petitioner while climbing the Jacobs ladder must in some fashion be accounted for in a manner to avoid his liability, the only suggestion this respondent's brief made to explain it is the inherent difficulty of climbing such a ladder for "a man of appellant's age".

Petitioner was at the time of the accident 47 years of age, in perfect health (R. 21), had been a seaman for thirty years and during his career must have climbed a ladder of this type many hundreds of times (R. 15).

Respondent Commercial meets it by professing to find a contradiction between the testimony of petitioner and of the witnesses for respondent where in fact there was none.

Under the heading "Evidence Contradicting Rojahan" its brief states (1) that Grillo denied that the ladder had any slack; (2) that he testified that the stevedores

---

up on the deck of the Erie 114. The testimony of Marino (foot of page 178 and top of page 179 of the Transcript of Record) clearly refers to the concern of the longshoremen on this point. It is reasonable to assume that the longshoremen pulled up the slack in this ladder so as to prevent the bottom steps from being crushed between Erie 114 and m/s Horda, and that it was their intention to release the slack before using the ladder again to descend to Erie 114."

At that stage of the case it may be stated that this respondent was interested in establishing its cross-claim against the other respondent Commercial.

Is the argument of a cause in a court of justice merely an exercise in forensic skill? Is an advocate, like a member of a college debating team, at liberty to change sides, freely to argue for the affirmative one day and then, over night, to argue for the negative with the same fervor and appearance of conviction?

at no time pulled up the ladder; and (3) quotes his wor
"I don't pull no ladder up."

A reference to the cited testimony will show that
to "(1)" he was asked, "did you at any time pull
the Jacobs ladder and allow any slack in it?", to wh
he replied, "No, *not that I remember*" (R. 140); t
as to "(2)" he was asked, "did you ever see any sl
in that ladder?", to which he replied, "No, *I ca
recall.*" (R. 140); as to "(3)", all that need be said
that neither Rojahan nor any one else asserted that
did.

As to Puglia, Commercial's brief states that he t
tified that at no time was there any slack in the lad
and that he did not pull up the ladder. His actual t
timony was that *he did not observe any slack in
ladder* (R. 167) and that *he* did not pull up the lad
or put any slack in it (R. 161).

Neither Rojahan nor any one else said that he d
In fact, Rojahan's testimony definitely excludes him
one of those who pulled up the ladder. His testimo
is that it was the last two men off the *Erie* who did
Puglia was not one of these, his testimony being t
when he left the *Erie* "there was a couple of oth
men coming up yet" (R. 162). Significantly, the l
man off the lighter *other than Marino* was not called.

Basis of Jurisdiction of the United States District Court

Jurisdiction of the District Court is based on Su
In Admiralty Act, 46 U. S. C. 741, *et seq.*

POINT I

When the testimony of witnesses, particularly disinterested witnesses, is not contradicted, when their credibility is not impeached and when it is not inherently improbable and when, if untrue, it is capable of contradiction, the trier of the facts may not disregard such testimony.

The testimony by and on behalf of petitioner that there was slack in the ladder, that the slack was created by the stevedore's men, and the manner in which it was created, that it was responsible for petitioner's fall from the ladder, the mute physical facts as to its length compared with the distance between the top of the *Horda's* rail and the deck of the *Erie*[13], that the bottom of the ladder was one foot above the deck of the *Eric* before and four feet below after petitioner's fall, all this testimony is wholly uncontradicted. The absence of contradiction is the more notable because employees of one or the other respondent were at or near the scene at the time of the accident or immediately preceding and following it. Yet none of the five witnesses they produced contradicted it.[14] None of the nineteen others who might have been in a position to contradict it[15] was

13. See ante, pp. 5-6.

14. See ante, p. 10.

15. See ante, note 8, p. 11.

produced or accounted for. Under these circumstances, the District Judge, as trier of the facts, was, under well-established authority, not free to disregard the testimony.

This Court in *Chesapeake & Ohio Railway* v. *Martin*, 283 U. S. 209, had occasion to consider the question as to the position of the trier of the facts in such a situation. Citing numerous decisions by courts of last resort in most of the States, this Court lays down the law thus (p. 216):

> "We recognize the general rule, of course, as stated by both courts below, that the question of credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable viewpoint is it open to doubt. The complete testimony of the agent in this case appears on the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of the opinion that this was not enough to take the question to the jury and that the Court should have so held."

The Court quoted with approval from *Hull* v. *Littauer*, 62 N. Y. 569, a long passage, part of which follows:

> "It is true that the evidence to establish the entirety of the contract was given by the defendants; but the rule which the plaintiff invokes is not applicable to such a case as this. Generally, the credibility of a witness, who is a party to the action, and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. *Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness.*" (Emphasis supplied.)

POINT II

When a Trial Judge gives as ground for his decisi that the evidence on behalf of one party "is in dir conflict with the evidence of the witnesses" for the otl party, and there is in fact no such conflict, his judgm is palpably without support and should not be permitt to stand.

In his opinion (Appendix to Appellant's Brief in Co of Appeals, p. 8) the Trial Judge wrote:

> "The testimony of the libelant's witnesses in direct conflict with the evidence of the witnes of the respondent as to whether there was a sl in the ladder."

The carefully detailed analysis of the testimony respondents' witnesses[16] shows that this statement is correct and has no support in the record. There is evidence whatever to justify this statement. The Distr Judge in his long opinion is unable to point to a such conflict. Respondents, in their briefs in the Co of Appeals, were likewise unable to point to any evide to contradict petitioner's testimony.[17] They will not able to do so here. The Court of Appeals, though matter was extensively argued in petitioner's brief, who ignored the point.

---

16. See ante, p. 10.

17. See ante, pp. 19-20-21.

The judgment is plainly based on a misconception of the evidence. It is wholly unsupported by evidence and should not be permitted to stand.

POINT III

There is no requirement in law that the finding of a Trial Judge "must be accepted" when that finding is palpably based on a misconception of the evidence, more particularly when it is not the result of "the opportunity of the Trial Court to judge of the credibility of witnesses."

The brief opinion of the Court of Appeals disposes of the main issue in the case in a single paragraph:

> "This crucial finding of the trial court, so carefully accommodated to the testimony as presented, must be accepted as being far from 'clearly erroneous.' McAllister v. United States, 348 U. S. 19, 20. It is of course supported by the lack of any plausible explanation for the slack in the first place or as to how the ladder with the slack could have supported libelant during most of his ascent, only suddenly to give way as he neared the top. The dismissal of the libel must therefore stand."

The phrase "clearly erroneous" quoted in the opinion is, of course, from Rule 52(a) of the Rules of Civil Procedure, which provides:

> "Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be give to the opportunity of the trial court to judge the credibility of witnesses."

This was designed to and did change the pre-existin rule which gave the findings of fact of the Trial Judg the same force as the verdict of a jury. It was intende to permit review of such a finding and to have it set asi when erroneous. An error as to a fact should be capable of correction on review as one of law. This ru was intended to bring that about. The necessity for r view, indeed, as to questions of fact, seems greate There are signs and guideposts on questions of law reported decisions of this Court and, where not availabl in decisions of other tribunals in the United States a in other jurisdictions following the Anglo-Saxon syste of jurisprudence. On the other hand, each case presen peculiar and individual problems of its own when comes to determination of the facts. The system of revie fails in part of its purpose if appellate courts mechanical take refuge in pat phrases or ready-made formulae to gi findings of a trial judge practical and irrevocable finali by adopting them without independent consideratio This, as is shown hereafter,[18] is what the Court Appeals in this case did. There is, of course, no su requirement. An appellate court is not compelled accept a decision contrary to the evidence. *United Stat* v. *United States Gypsum Company*, 333 U. S. 364, 39 *McAllister* v. *United States*, 348 U. S. 19, 20; *State Fa Mutual Auto Insurance Co.* v. *Bonacci*, 111 F. (2) 4 (8 Cir.).

In the case first cited, this Court said:

---

18. See post, pp. 32-33.

"It (*i. e.*, Rule 52[a]) was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations and judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice of equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witness would best be judged, had weight with the appellate court. *The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis supplied.)

In *State Farm Mutual Auto Insurance Co.* v. *Bonacci, supra,* the Court of Appeals of the 8th Circuit, also discussing Rule 52(a), plainly marks out the proper function and role of an appellate court reviewing a District Court's finding of fact:

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. *If the findings are clearly erroneous, the appellate court should set them aside,* always give due regard to the fact that the trial

court had the opportunity of observing the witnesses. In Simkins Federal Practice, Third Edition, page 488, in commenting on the effect of Rule 52(a) it is said:

> "'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.
>
> "'Under the new practice, where findings are made by the court without a jury, *the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence*, at the same time giving full effect to special qualification of the trial judge to pass on credibility.'" (Emphasis supplied.)

Moreover, what the Court below, in accepting the District Judge's findings, clearly overlooked is that the mandate of Rule 52(a) plainly contemplated, in according the force it did to the findings of the Trial Court, that "regard shall be given to the opportunity of the Trial Court to judge of the credibility of witnesses." In the case at bar, the Trial Court was not aided in determining the facts by his assumed superiority in passing on credibility by seeing and hearing the witnesses. His appraisal of their credibility is based on considerations appearing in the record, the validity of which can be determined as effectively by reading the record in light of his opinion. That so judged, they are based on misapprehensions of the testimony and on faulty reasoning,

has, we submit, been demonstrated.[19] The Court of Appeals wholly overlooked these considerations, though attention was called to them, and adopted and made its own the Trial Judge's finding including, it will be shown, his errors and misapprehensions.

The District Judge in rendering his opinion, and the Court of Appeals in adopting it, have in effect stamped as perjurors petitioner and two respectable sea captains, at least one of them a total stranger to petitioner, both of them without financial or other interest in the outcome of the litigation. Why should they have testified falsely? For, if their testimony is rejected, there can be no escape from the conclusion that these men and petitioner wilfully perjured themselves. It is not possible in this situation to palliate their testimony by any charitable assumption that they were mistaken or that they bent or stretched the truth a little. Their detailed account of the accident, of its circumstances, of the acts of the various persons involved, of the position of the ladder, of the distances, etc., if found to be untrue cannot be explained by any assumption that they were honestly mistaken. If untrue, it could have been only the result of a deliberately concocted conspiracy among the three men to thwart justice and mulct the respondents by false testimony. This conspiracy, if conspiracy there was, must have had its origin immediately after the accident when the police officer was informed about the slack in the ladder while petitioner was lying on the deck of the lighter badly injured.

---

19. See ante, pp. 9-10-11.

POINT IV

It is the obligation of a Court of Appeals reviewing a decision by a Court without a jury itself independently to consider whether on the entire record it is not left "with a definite and firm conviction that a mistake has been committed", whether such mistake be of law or of fact.

A reading of the Court of Appeals brief opinion suggests, in so far at least as a review of the Judge's findings is concerned, that it was *pro forma* and perfunctory. It sustained the District Judge on two grounds: (1) "the lack of any plausible explanation for the slack in the first place; and (2) "the lack of an explanation as to how the ladder could have supported libelant during most of its ascent, only suddenly to give way as he neared the top." In his opinion the Trial Judge had said that "no apparent reason existed for pulling up a portion of [the ladder] and piling it on the deck of the vessel" and that "the slack would have been taken up as soon as the libelant pulled on the bottom of the ladder, and, surely so, as soon as he placed his full weight upon it when he first stepped upon the bottom rung of the ladder."

The Court of Appeals, thus, it is clear, got its view of the case from the Trial Judge and in adopting his views adopted also his errors and misconceptions as to the testimony. The implication of both Courts in the cited passage is, of course, that there could have been no slack.

If the Court of Appeals had read the record and briefs before it and examined them independently, instead of merely reading the Trial Judge's opinion and getting its facts from that opinion, its observations would not have been made because the following facts would have been apparent:

That the slack was created is established directly by Rojahan's testimony that the ladder was pulled up (R. 47); that it existed thereafter is established by petitioner's testimony that the slack came down with him when he fell (R. 18); it is also established indirectly but by inevitable inference from the testimony of Forwalk that before the ladder fell its bottom was one foot above the *Erie* and afterward it was four feet below (R. 108), a fact which no one denied. The reason the ladder was not pulled up completely but left suspended over the side of the *Horda* was because the stevedores were returning to work the following day and wanted to save themselves the labor of bringing the heavy ladder back; the reason the ladder was pulled up from the *Erie* was, it is made clear from the testimony of both respondents, Johannessen, Third Mate of *Erie* (R. 245-6), and Marino, boss of the stevedores gang (R. 178-9), that the ladder might be damaged if left hanging in a position between the two vessels and be subjected to chafing between them.

Petitioner's brief in the Court of Appeals called attention to these facts. Respondents' briefs, though attempting to disprove the existence of the slack, did not question the reason for its creation.

The reason for the ladder's fall when petitioner had nearly completed his ascent and for its supporting him until then has been explained heretofore.[20]

---

20. See ante, pp. 17-18.

Since the adoption of Rule 52(a) of the Rules o Civil Procedure, it has become the right—*and the obligation*—of an appellate court reviewing the findings o fact of a Trial Court without a jury, to review them independently, to reach its own conclusions after such review and to "set them aside if against the clear weight of the evidence" (*State Farm Mutual Auto Insurance Co.* v. *Bonacci, supra*). Had the Court here done that, it would unmistakably have been "left with the definite and firm conviction that a mistake has been made" (*United States* v. *United States Gypsum Co., supra*; *McAllister* v. *United States, supra*).

That "definite and firm conviction" is inescapable here.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

ABRAHAM M. FISCH,
Attorney for Petitioner,
No. 225 Broadway,
Borough of Manhattan.
City of New York.

ARTHUR HUTTER,
SAMUEL FRIEDLANDER,
Of Counsel.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 136—October Term, 1955.

rgued December 12, 1955. Decided January 3, 1956.)
Docket No. 23756

LORENTZ LUDVIGSEN,
Libelant-Appellant,

—v.—

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,
Respondents-Appellees.

efore:

CLARK, *Chief Judge,* and
MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the astern District of New York, Walter Bruchhausen, *Judge.*

Opinion

Lorentz Ludvigsen appeals from the dismissal of his libel for personal injuries alleged by him to have been sustained through the negligence of Commercial Stevedoring Co., Inc., and A/S J. L. Mowinckels Rederi, as owner of the M/S Horda. Modified and affirmed.

SAMUEL FRIEDLANDER, New York City (Abraham M. Fisch and Arthur Hutter, New York City, on the brief), *for libelant-appellant.*

ALBERT P. THILL, Brooklyn, N. Y. (Thomas F. Keane, Brooklyn, N. Y., on the brief), *for respondent-appellee Commercial Stevedoring Co., Inc.*

J. WARD O'NEILL, New York City (Haight, Gardner, Poor & Havens and David P. H. Watson, New York City, on the brief), *for respondent-appellee A/S J. Ludwig Mowinckels Rederi.*

CLARK, *Chief Judge*:

This is a libel for personal injuries brought by libelant, a lighter captain against a stevedoring company (the first named respondent) and the owner of the motor vessel Horda (the second named respondent). On July 19, 1950, libelant brought his lighter, a Lehigh Valley scow, alongside the Horda, then moored at Pier 34, Brooklyn, to discharge his cargo on the vessel. In the course of his operation he had occasion to go onto another scow and thence up

a Jacob's ladder (of rope sides and wooden steps) to the Horda's deck. His case was that, when he was nearly at the top, the slack of the ladder, which unknown to him had been drawn up on the deck, was suddenly released, causing him to lose his hold and fall to the deck of the scow, with the resulting injuries for which he was suing. The issue as tried below was as to whether or not there was actually any such slack (left presumably by the stevedore's workmen); and Judge Bruchhausen, upon a most careful analysis of the considerable testimony of the various people present, rejected that tending to show the presence of slack and found that libelant had not sustained his burden of proof. Accordingly he dismissed the libel.

This crucial finding of the Trial Court, so carefully accommodated to the testimony as presented, must be accepted as being far from "clearly erroneous." *McAllister* v. *United States*, 348 U. S. 19, 20. It is of course supported by the lack of any plausible explanation for the slack in the first place or as to how the ladder with the slack could have supported libelant during most of his ascent, only suddenly to give way as he neared the top. The dismissal of the libel must therefore stand.

Libelant objects to the inclusion in the vessel's owner's bill of costs of an item of $708.60 for mileage (equal to the air-line fare) from Oslo, Norway, to the witness Johannessen, the Third Mate brought on by this appellee to testify. This item was allowed by the clerk, though with some doubt, and was included in the costs stated in the final decree signed by the judge. Admiralty Rule 47 is quite specific, however, to the effect that "Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed

as costs." As stated in 3 Benedict on Admiralty 219, 22 (6th Ed. 1941), this expressed in admiralty what had com to be the settled rule in civil actions. See, e.g., *Vincenne Steele Corp.* v. *Miller*, 5 Cir., 94 F. 2d 347; *Friedman Washburn Co.*, 7 Cir., 155 F. 2d 959; *Kenyon* v. *Automat Instrument Co.*, D. C. W. D. Mich., 10 F. R. D. 248; *Bar hart* v. *Jones*, D. C. S. D. W. Va., 9 F. R. D. 423; *Perlma* v. *Feldmann*, D. C. Conn., 116 F. Supp. 102, 115. Appelle attempts to explain the *Barnhart* case as a limitation onl on *domestic* mileage; but the precedents do not suggest an such limitation, nor does the admiralty rule almit of suc a debilitation of its manifest purpose. The clerk relie upon 28 U. S. C. § 1821, though he found it ambiguous; bu that at best deals with the allowance to the witnesses, an not the taxation of costs in favor of a winning, and agains a defeated, litigant. This item must therefore be reduce to $14, or 7¢ a mile for 200 miles.

The decree below must therefore be modified by reduc ing the costs allowed respondent A/S J. L. Mowinckel Rederi by the sum of $694.60 to the total of $295.90, an as thus modified is affirmed. Costs on this appeal ar allowed to the libelant as against this responden Mowinckels.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 3rd day of January, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

LORENTZ LUDVIGSEN,
Libelant-Appellant.

—v.—

COMMERCIAL STEVEDORING CO., INC.,
COSMOPOLITAN SHIPPING CO., INC., and
A/S J. L. MOWINCKELS REDERI,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified by reducing the costs allowed respondent A/S J. L. Mowinckels Rederi by the sum of $694.60 to the total of $295.90 and as thus modified said decree be and it hereby is affirmed.

Further ordered that costs on this appeal be and they hereby are allowed to the libelant as against respondent Mowinckels.

A. DANIEL FUSARO,
Clerk.

FILED
MAR 26 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

against

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON BEHALF OF COMMERCIAL STEVEDORING CO., INC., RESPONDENT, IN OPPOSITION

THOMAS F. KEANE,
ALBERT P. THILL,
130 Clinton Street,
Brooklyn, New York,
Attorneys.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Argument	4
Conclusion	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

against

COMMERCIAL SEVEDORING CO., INC., and
A/S L. J. MOWINCKELS REDERI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF ON BEHALF OF COMMERCIAL STEVEDORING CO., INC., RESPONDENT, IN OPPOSITION

Opinions Below

Although neither of the opinions of the Courts below have been officially reported, the opinion of the District Court for the Eastern District of New York is reproduced at pages 4-11 of Libelant's Appendix in the Court of Appeals, and the opinion of the Court of Appeals is annexed to the petition as Appendix A, pages 35-38.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered January 3, 1956. The petition for a writ of certiorari was filed on the 8th day of March, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

Question Presented

Whether the United States Supreme Court is constituted for the purpose of reweighing conflicting evidence on a disputed question of fact, after one District Judge and three judges of the United States Court of Appeals have already done so and unanimously agreed the great weight of the evidence is against the petitioner and in favor of respondents.

Statement

Petitioner seeks to review the judgment of the Court below, which unanimously affirms a decree of the District Court, dismissing the libel.

The controversy arose out of the following facts:

Libelant fell while climbing a pilot's ladder made of wooden rungs with rope sides.

This ladder was part of the equipment of the M. S. Horda, owned by respondent Rederi; the ladder had been rigged, properly and securely, by respondent Stevedore over the side of the Horda so that it reached the deck of the scow Erie 114, which was moored alongside the Horda.

The Stevedore crew, of eight men, used the ladder to reach the Erie 114, so as to load cargo from that scow into the Horda.

At about 2:35 P. M. on the day of the accident the stevedores stopped loading the Horda and used the ladder to start work on another ship. About one hour later, libelant also used the ladder and climbed some twenty feet almost to the rail of the Horda, at which point libelant says the "ladder came down", and he fell.

Libelant did not test the ladder before he began his climb but "just went right up the ladder like I always do."

One witness, Rojahan, said he saw the "two last" stevedores who used the ladder at 2:35 P. M. pull four or five steps of it up over the rail and onto the deck of the Horda.

But three stevedores, including one Marino, who as the "header" of the gang was the last man to use the ladder, testified categorically the stevedore did not pull up the ladder.

The libelant offered no evidence that even assuming the stevedore did pull up the ladder, that thereafter the part so raised was not properly lashed to the deck of the Horda.

But the third mate of the Horda testified affirmatively that at all times the ladder was properly lashed, taut, and no slack was piled up on the deck of the Horda.

Libelant offered no evidence to explain how, if a pile of unsecured slack ladder did exist, it could support his weight while he climbed twenty feet to the rail of the ship; and if the ladder was sufficiently secure to support libelant while he climbed twenty feet, what caused it to suddenly give away at that point.

The witness Rojahan, who says he saw the "two last" stevedores pull up the ladder, was contradicted not only on that specific prime issue, but on other collateral matters which weakened his credibility, *e. g.*,

1. Rojahan said the Erie 114 was fully discharged and light * * * but the captain of the Erie 114, as well as the

stevedores unloading records, showed she was loaded wi
cargo piled twelve to fourteen feet above her deck a
covering one-half of the deck. From the relative positio
of the vessels in the slip, cargo piled on the deck of t
Erie 114 would have prevented Rojahan from seeing all
said he did * * * or at least a trier of fact could so find.

2. Rojahan said he saw a pile of slack ladder on t
deck of the Erie 114 * * * but the captain of the Erie 1
said there was no such slack on the deck of his vess
This contradiction was material because unless there w
slack at the bottom of the ladder and on the deck of t
Erie 114, then there was no slack for Rojahan to "see
the stevedore pull up onto the deck of the Horda.

Argument

From the above facts it is clear that no more than a di
puted question of fact was presented in this case.

Libelant's single witness, Rojahan, who says the "tw
last" stevedores raised the ladder, was flatly contradict
on that point by three stevedores, including Grillo, t
hatch foreman, and the "header", Marino, who was t
last man of the gang off the ship.

Rojahan was also contradicted on collateral issues
other witnesses, some called by the libelant himself, a
some by the ship owner.

The record contains ample and substantial evidenc
which together with the reasonable inferences to be dra
therefrom, justified the District Court, as the trier of fa
to find that there was no slack in the ladder created by t
stevedore.

The United States Court of Appeals has reviewed th
decision of the District Court, and three experienc
judges of that Court have unanimously affirmed.

There is no question of "wide import" presented which should move this Court in the exercise of its sound judicial discretion to grant the petition for a writ. There is no conflict of decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS F. KEANE,
ALBERT P. THILL,
Attorneys.

Office - Supreme
FIL
APR 4
HAROLD B. WI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

against

COMMERCIAL STEVEDORING CO. INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT A/S J. LUDWIG MOWINCKELS REDERI IN OPPOSITION

J. WARD O'NEILL,
Counsel for Respondent,
A/S J. Ludwig Mowinckels Rederi.

DAVID P. H. WATSON,
on the Brief.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
The Statute Involved	2
Statement	2
ARGUMENT	6
The Decision Below is Clearly Correct	8
There is No Conflict of Decisions	11
There is no important question of Federal law presented, and the issue of fact does not warrant review by this Court	13
CONCLUSION	15

TABLE OF CASES CITED

Allen, Collector of Internal Revenue v. Trust Company of Georgia, 326 U. S. 630 (1946)	14
A. & P. Tea Company v. Super Market Corp., 340 U. S. 147 (1950)	14
Comstock v. Group of Institutional Investors, 335 U. S. 211 (1948), rehearing denied 335 U. S. 837	13
Graver Manufacturing Co. v. Linde Co., 336 U. S. 271 (1949)	13
McAllister v. United States, 348 U. S. 19 (1954)	9, 11
Petterson v. Alaska Steamship Co., 205 F. (2d) 478 (9 C. A.), aff'd 347 U. S. 396	9

PAGE

State Farm Mutual Auto Insurance Co. v. Bonacci, 111 F. (2d) 412 (1940) 11, 12

United States v. O'Donnell, 303 U. S. 501 (1938) 14

United States v. United States Gypsum Co., 333 U. S. 364 ..... 7, 11

United States v. Yellow Cab Co., 338 U. S. 338 (1949) 10

STATUTES CITED

Expediting Act, 15 U. S. Code, Section 29 10

Federal Rules of Civil Procedure, Rule 52(a) 2, 7, 9, 10, 11, 12, 13

Sherman Anti-Trust Act:

Section 1 10

Section 2 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

against

COMMERCIAL STEVEDORING CO. INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

BRIEF OF RESPONDENT A/S J. LUDWIG MOWINCKELS REDERI IN OPPOSITION

Opinions Below

The opinion of the District Court (App. App.* 3) is not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (Appendix A Petition) is officially reported at 228 F. 2d 707.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

---

* App. App. refers to Appellant's (petitioner's) Appendix in the Court of Appeals.

Questions Presented

The four questions presented by the petitioner on pages 2 and 3 of his Petition find no basis in the record or in the opinions of the two Courts below and are, in fact, hypothetical questions based upon assumed statements of fact.

The issue presented by the Petition is whether this Court will re-evaluate the trial testimony when, on a conscientious consideration of the entire record, a Court of Appeals has unanimously affirmed the District Court judgment dismissing the libel, and when the Court of Appeals has held that the findings of the trial Judge were "far from 'clearly erroneous'" (Appendix A, P. 37 of Petition).

The Statute Involved

No statute is urged by petitioner. The review by the Court of Appeals was conducted pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, and particularly that portion of Rule 52(a) reading as follows:

> "* * * Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Statement

The Petition seeks a review of the decision of the United States Court of Appeals for the Second Circuit rendered on January 3, 1956, insofar as it affirmed the District Court decree dismissing the libel after the trial.

Petitioner brought the action in the United States District Court for the Eastern District of New York to recover for injuries sustained by him on July 19, 1950, while

ascending a Jacobs ladder leading up from Erie Railroad lighter No. 114 to the main deck of the m/s Horda. The respondents were Commercial Stevedoring Co., Inc., the stevedore engaged in transferring cargo from Erie No. 114 to m/s Horda, and Mowinckels, the owner of the m/s Horda. It was petitioner's claim in the trial in the District Court that on the day of the accident his lighter, a Lehigh Valley Railroad lighter, referred to as Lehigh No. 139, came alongside m/s Horda and moored astern of Erie Railroad lighter No. 114, which was already alongside m/s Horda (R. 15, 16, 17). At that time there was already a Jacobs ladder leading from the main deck of m/s Horda down to Erie No. 114 (R. 17). The ladder had been rigged earlier in the day by the stevedore Commercial in order to enable its men to get to and from the lighter (R. 38; Mow. App.* 2a, 3a; R. 137-140; Mow. App. 13a, 14a).

In going to report his arrival to the freight receiving office of the stevedore on the pier, petitioner crossed over to Erie No. 114 and started climbing the Jacobs ladder (R. 18; Mow. App. 1a). When near the top of the ladder he fell down onto Erie No. 114 and was injured (R. 18; Mow. App. 1a). It was the testimony of petitioner's witness that the longshoremen, the employees of respondent Commercial had pulled up the Jacobs ladder after they had finished work on Erie No. 114 approximately one-half hour earlier, so that several rungs of the ladder were pulled inboard of the rail of m/s Horda (R. 47, 48; Mow. App. 3a, 4a). Petitioner's witness claimed that when petitioner was near the top of the ladder, this slack payed out, causing the ladder to drop several feet, at which point petitioner lost his grip (R. 49-53; Mow. App. 4a-7a).

On the other hand, the testimony of Commercial's witnesses was that at no time had the ladder been pulled up (R. 140; Mow. App. 14a; R. 169, 170; Mow. App. 16a, 17a). They said the ladder had been properly rigged by them,

* Mow. App. refers to Appendix to Mowinckels' Brief in Court of Appeals.

and that it remained so (R. 38, 39; Mow. App. 2a, 3a; R. 133-140; Mow. App. 12a-14a). Their testimony, both inferentially and directly, contradicted petitioner's claim that there had been unsecured slack in the ladder at the time he started up. The testimony of the Mowinckels' witness, the ship's officer, was that the Jacobs ladder had been properly secured both before and after the fall and was in perfect condition (R. 230; Mow. App. 21a; R. 241, 242; Mow. App. 22a; R. 260; Mow. App. 24a, 25a). Here, too, the testimony, both directly and inferentially, pointed to the fact that there had been no slack in the ladder. Other discrepancies in testimony, too numerous to list, served to cast doubt upon libelant's case. All the conflicting testimony and the discrepancies were fully quoted in Mowinckels' Appendix in the Court of Appeals and in Commercial's Appendix in the same Court.

The trial Judge, after hearing the testimony of the fourteen fact witnesses, all of them in person, made sixteen findings of fact, eight of which bore directly upon the rigging, condition and use of the Jacobs ladder (App. App. 14-18). The trial Judge specifically found that there had been no slack in the ladder as claimed by libelant (Findings 10 and 16; App. App. 16 and 17). Based upon these findings of fact, the trial Judge concluded that "libelant failed to carry his burden of proof to establish his cause of action against either respondent" (Conclusion 2; App. App. 18).

The trial Judge both in his opinion and in his findings of fact, referred repeatedly to the conflicts of testimony which formed the basis for his disbelief of petitioner and petitioner's witnesses on the issue of the alleged slack in the Jacobs ladder (App. App. 3-8 and 14-18).

Petitioner then appealed to the United States Court of Appeals for the Second Circuit alleging that "the opinion of the Trial Judge saw issues of fact where the testimony created none and found conflicts of testimony where none existed" (Page 1, Appellant's Brief in Court of Appeals).

The United States Court of Appeals for the Second Circuit, in an opinion by Chief Judge Clark, affirmed the decree below on the merits, modifying it only by reducing the costs allowed to respondent Mowinckels, a matter not relevant to the Petition. In passing upon the substantive aspects of the appeal, Chief Judge Clark wrote as follows (App. A, P. 37 of Petition):

> "The issue as tried below was as to whether or not there was actually any such slack (left presumably by the stevedore's workmen); and Judge Bruchhausen, upon a most careful analysis of the considerable testimony of the various people present, rejected that tending to show the presence of slack and found that libelant had not sustained his burden of proof. Accordingly he dismissed the libel.
>
> This crucial finding of the Trial Court, so carefully accommodated to the testimony as presented, must be accepted as being far from 'clearly erroneous'. *McAllister* v. *United States*, 348 U. S. 19, 20."

Chief Judge Clark concluded that

> "The dismissal of the libel must therefore stand."

Apparently undaunted by the fact that three Judges of the Court of Appeals agreed with the trial Judge on the facts, petitioner now urges to this Court that the "Trial Judge * * * misapprehended the evidence, overlooked some testimony and found conflicts where none existed and contradictions and inconsistencies where the testimony created none" (Petition 8). This was the same claim he unsuccessfully brought before the Court of Appeals. Now that the affirmance by the Court of Appeals is behind him, petitioner also claims that the Court of Appeals "got its view of the case from the Trial Judge and in adopting his views adopted also his errors and misconceptions as to the testimony" (Petition 32).

ARGUMENT

The issue presented by the petitioner is factual only. Petitioner is asking this Court to review the entire District Court record on the presumption that having done so, this Court would have to conclude that the District Court Judge was wrong in his evaluation of the conflicting testimony, and that the Court of Appeals was also wrong in having held unanimously that the findings of the District Judge were "far from 'clearly erroneous' ".

The four questions presented on pages 2 and 3 of the Petition, are hypothetical and find no basis in the record or in the opinions of the District Court or the Court of Appeals.

In the first question petitioner asks this Court whether a District Court Judge as a trier of the facts may "disregard the uncontroverted evidence of disinterested witnesses". The critical word in that question is, of course, "uncontroverted". Petitioner claims the testimony was uncontroverted, but the District Judge and the Court of Appeals disagreed with him. The District Judge found that the testimony on the crucial points was in conflict and found the trial record to be replete with contradictions. His opinion and his findings of fact leave no doubt about that. The petitioner made this same claim in appealing to the Court of Appeals. The Court of Appeals rejected the argument.

The second question presented by the petitioner asks whether the finding of conflict by the trial Judge can be supported in the record when "there is in fact no such conflict". The District Court Judge and three Court of Appeals' Judges all thought there *was* conflict of testimony, and the latter found the "crucial finding of the trial Court so carefully accommodated to the testimony as presented".

In the third question petitioner asks this Court whether a decision of a District Court Judge must be accepted by the Court of Appeals when it "is palpably based on misconceptions of the evidence and on unwarranted inferences therefrom apparent on the face of the record". Petitioner assumes in this third question that the decision of the trial Judge was in no way "dependent on his judgment as to the credibility of the witnesses based on their appearance and manner" (Petition 3). Certainly the findings of fact and the opinion of the trial Judge indicate otherwise. The trial Judge specifically rejected certain phases of the testimony of some witnesses and specifically accepted the contradictory versions given by other witnesses. Rule 52(a) of the Federal Rules of Civil Procedure is abundantly clear as to the scope of review by a Court of Appeals in such a situation when it states that:

> "* * * due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses. * * *"

Finally, in his fourth question, petitioner presents nothing more than a truism. He asks whether it is not the obligation of the Court of Appeals to determine whether it is not left "with a definite and firm conviction that a mistake has been committed". That, of course, is a quotation from the decisions of this Court both in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, and *McAllister* v. *United States*, 348 U. S. 19, 20. This Court used that language as a criterion for determining whether findings of fact were "clearly erroneous". Since the Court of Appeals found that the crucial findings of fact were "far from 'clearly erroneous'" and then cited *McAllister* v. *United States, supra,* it would seem that the Court of Appeals had the rule of the *McAllister* decision in the forefront of its mind. The only manner in which this could have been made clearer for the benefit of the petitioner would have been if Chief Judge Clark had included

in his opinion a verbatim statement that the Court was *not* left "with a definite and firm conviction that a mistake has been committed" (333 U. S. 395).

The Decision Below is Clearly Correct

The trial in the United States District Court for the Eastern District of New York was held before the Judge, sitting in admiralty without a jury. The key issue was pinpointed by the trial Judge in his opinion as follows (App. App. 5):

> "The principal issue is whether there was a slack in the ladder, caused by pulling the upper portion of it up on to the deck. It is undisputed that the ladder was owned by the shipowner; that it was put over the side of the ship by the stevedore; that it was properly fastened to the deck of the vessel Horda and was in good condition."

Further on in the opinion, after several pages of discussion of the testimony, the trial Judge wrote as follows with respect to that issue (App. App. 8):

> "The testimony of the libelant's witnesses is in direct conflict with the evidence of the witnesses of the respondent as to whether there was a slack in the ladder."

And later in the opinion the trial Judge followed this up by stating (App. App. 10):

> "The testimony of the stevedore [Commercial] is more believable. * * * Other tests of the libelant's case disclose its weakness."

Furthermore, in his findings of fact the trial Judge specifically found that no slack had been put in the ladder by the employees of respondent Commercial (Findings of Fact 10 and 16; App. App. 16, 17).

Following that dismissal the Court of Appeals reviewed the record in the District Court and affirmed the judgment below. The scope of the review by the Court of Appeals was governed by Rule 52(a) of the Federal Rules of Civil Procedure, reading, in part, as follows:

> "* * * Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

With this criterion in mind, the Court of Appeals commented that the crucial finding of the trial Judge as to the absence of slack in the ladder was "far from 'clearly erroneous'" (Petition 37).

The Court of Appeals, having so found, had little alternative but to affirm the judgment below, since the language of Rule 52(a) is mandatory and not permissive.

The scope and limitation of a review by a Court of Appeals in such a situation was definitively set forth by this Court in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), when Mr. Justice Minton wrote as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals *may not* set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." (Emphasis supplied.)

To the same effect is the language in *Petterson* v. *Alaska Steamship Co.*, 205 F. (2d) 478, 479 (9 C. A.), affirmed 347 U. S. 396, without opinion:

> "In admiralty appeals *findings of fact based upon credibility of witnesses who testify in open court will not be set aside.* But an admiralty appeal is a trial *de novo, Olsen* v. *Alaska Packers*, 9 Cir., 114 F. 2d 364, and this court may make its own inferences from the facts as found *where it does not upset the findings based on the credibility of witnesses.*" (Emphasis supplied.)

The Court of Appeals was, of course, well aware from the findings of the trial Judge and from the wording o his opinion that his decision was in part based upon hi appraisal of the credibility of the various fact witnesse who testified personally before him.

Even if we were to assume that the trial record per mitted of two views of the weight of the evidence, on favorable to the petitioner and the other unfavorable, th limitations of a review under Rule 52(a) are clearly se forth by the decision of this Court in *United States* v. *Yel low Cab Co.*, 338 U. S. 338 (1949). This was a suit i equity, under Sections 1 and 2 of the Sherman Anti-Trus Act, where the District Court found that the governmen had failed to prove its case. The cause came before thi Court by direct appeal under the Expediting Act, 15 U. S Code, Section 29. Mr. Justice Jackson commented on pag 340 that:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own."

Later, at page 342, Mr. Justice Jackson commented upon the scope of the review by this Court under Rule 52(a):

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

There is nothing that would indicate that the conduct of the trial and appeal of this action was any different from the myriad of similar cases where an attempt is made on appeal to have the Court of Appeals retry a non-jury case on all evidence. The Court of Appeals in this instance

reviewed the District Court judgment within the permissible limits of Rule 52(a) of the Federal Rules of Civil Procedure with an eye to the latest pronouncement of this Court with respect to that rule as contained in *McAllister* v. *United States, supra.*

There is No Conflict of Decisions

Petitioner suggests on pages 28 through 30 of his Petition, that the decision of the Court of Appeals is inconsistent with the decisions of this Court in *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 394, and *McAllister* v. *United States, supra,* and inconsistent with the decision of the United States Court of Appeals for the Eighth Circuit in *State Farm Mutual Auto Insurance Co.* v. *Bonacci,* 111 F. (2d) 412 (1940).

On page 29 of the Petition there is quoted the following portion of the opinion in *United States* v. *United States Gypsum, supra,* as found at 333 U. S. 395:

> "The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This, of course, is the very same language which was quoted by this Court in *McAllister* v. *United States, supra,* and is to be found on the very page referred to by Chief Judge Clark after he had held that the crucial finding of the trial Court was "far from 'clearly erroneous'" (Petition 37). In the light of this specific reference by Chief Judge Clark to the language of this Court, can we assume that he did not apply the approved criterion? Is it not implicit in the opinion of the Court of Appeals that the Court was *not* "left with the definite and firm conviction that a mistake has been committed"?

Nor is there anything in the decision of the Eighth Circuit in *State Farm Mutual Auto Insurance Co.* v. *Bonacci supra,* which varies or differs from the application of Rule 52(a) either by this Court or by the United States Court of Appeals for the Second Circuit in the instant matter. As a matter of fact, a comparison between that Eighth Circuit decision and the instant matter is hardly in point since the *Ludvigsen* witnesses all testified in person before the trial Judge and he was personally able to assess their credibility. On the other hand, in the *Bonacci* case the situation was different:

> "The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants not in the presence of the lower court but in the course of trial of the damage actions in the state court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court" (111 F. 2d 415).

In other respects the *Bonacci* decision conforms to the rules governing the application of Rule 52(a) as set forth by this Court and as put into practice by the United States Court of Appeals for the Second Circuit. The italicized portions of the *Bonacci* decision quoted on pages 29 and 30 of the Petition could as well have been included in the Court of Appeals opinion in this *Ludvigsen* matter. Obviously, "If the findings are clearly erroneous, the appellate court should set them aside" (111 F. 2d 415). No one questions that fact and no one is contending that findings of fact are conclusive (333 U. S. 395; Petition 29). Chief Judge Clark did not say the findings of fact were conclusive.

The Eighth Circuit, in the *Bonacci* case, said that Rule 52(a) "plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings" (111 F. 2d 415). Applying that standard to the instant matter, it will be noted that Chief Judge Clark held that the "crucial finding of the Trial Court was carefully accom-

modated to the testimony as presented" (Petition 37). In other words, Chief Judge Clark, with whom the balance of the Bench agreed, was convinced "of the sufficiency of the evidence to sustain the findings".

There is no important question of Federal law presented, and the issue of fact does not warrant review by this Court.

As the Petition so clearly shows, petitioner seeks a factual review. He disagrees with the trial Judge's evaluation of the testimony and, of course, disagrees as well with the results of the review by the Court of Appeals.

The District Court Judge and three Judges of the Court of Appeals all concurred as to the facts.

In a long series of cases, this Court has subscribed to the "two-court rule" holding that the Supreme Court of the United States, being a Court of law rather than a Court for the correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error. Such is the language of Mr. Justice Jackson in discussing the scope of Rule 52(a) of the Federal Rules of Civil Procedure in *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). That action was subsequently reheard on other issues (337 U. S. 910 and 339 U. S. 605), but the "two-court rule" was not changed.

In *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211 (1948), rehearing denied 335 U. S. 837, the issue involved was objections made to the allowances of a claim of approximately $10,000,000 by the Missouri Pacific, one debtor corporation, against another, the New Orleans. After a full hearing, the District Court made findings and wrote an opinion overruling the objections. The Court of Appeals for the Eighth Circuit affirmed. This Court

affirmed in an opinion by Mr. Justice Jackson, and on the question of review of the issues of fact, Mr. Justice Jackson wrote (at p. 213 of 335 U. S.):

> "The issues of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts.'
>
> Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of this court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error" (citations).

To the same effect are the earlier rulings of this Court in *Allen, Collector of Internal Revenue* v. *Trust Company of Georgia,* 326 U. S. 630, 636 (1946), and *United States* v. *O'Donnell,* 303 U. S. 501, 508 (1938). In both these suits this Court held that since both courts below had resolved the issues of fact in favor of the same party, this Court would not re-examine the evidence, but would accept the findings of the two lower courts as establishing the facts in issue.

The "two-court rule" (so referred to in *A. & P. Tea Company* v. *Super Market Corp.,* 340 U. S. 147, 153 (1950)) establishes that there is nothing in the Petition warranting a review by this Court, since the petitioner is presenting nothing more than a factual issue upon which both lower courts were in full agreement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted hat the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Respondent,
A/S J. Ludwig Mowinckels Rederi.

DAVID P. H. WATSON,
on the Brief.

FILED
APR 6 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

—against—

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

PETITIONER'S REPLY BRIEF

In the petition herein, there is presented a carefully documented analysis of the record and of the testimony, supported by quotations from the actual testimony. Based on that analysis, it is asserted that there is no evidence in any way conflicting with the testimony by and on behalf of the petitioner. That testimony being thus uncontroverted, not being improbable, the credibility of petitioner and his disinterested witnesses not having been impeached, it is contended that the decisions of the District Court and of the Court of Appeals are in conflict with a decision of this Court (*Chesapeake & Ohio Railway v. Martin*, 283 U. S. 209).

This, briefly stated, is the main issue respondents were called on to meet.

The briefs of both respondents fail to do so. They wholly fail to show the existence of any controverted material questions and of any support for the decisions of the Courts below.

The brief of respondent Commercial Stevedoring Co., Inc., purports to state the evidence in the case. It does so without a single reference to the record, notwithstanding the requirement of Rule 40(e) of the Rules of this Court. This is not the result of carelessness or oversight. The conspicuous inaccuracies of the purported statement of fact—inaccuracies which can hardly be unintentional—would have been seriously embarrassed by references to the record which do not support them. To establish their inaccuracies would unduly lengthen this brief. The undocumented assertions, contrasted with the careful documentation of petitioner's brief, carry their own refutation.

Nor does the brief or respondent Mowinckels Rederi meet the issue. It is wholly devoid of a showing of any testimony disputing the petitioner's case. Such references to the record as there are in that brief as to the material issues in the case—the creation and existence of slack in the ladder at the time of petitioner's accident—show that the testimony of respondent's witnesses on this subject consisted solely of disclaimers of knowledge or lack of recollection. The accuracy of the summary of the testimony of respondents' witnesses as set forth with meticulous care and references to the record in the petition (p. 10) is not disputed.

All this respondent is able to do in order to support the decisions of the courts below is to quote from the Trial Court's opinion:

"The testimony of the libelant's witneses is in direct conflict with the evidence of the witnesses of the respondent as to whether there was a slack in the ladder."

This bald statement, wholly unsupported in the Trial Judge's opinion, is likewise wholly unsupported in the briefs of respondents.

In these circumstances, *United States* v. *Yellow Cab Co.*, 338 U. S. 338, cited in support of respondent's position, is wholly inapplicable. In that case, as Mr. Justice Jackson said (342), *"the evidence would support a conclusion either way"* and "the Trial Judge has decided it to weigh more heavily for the defendants". In such a case, the Court said, "a choice *between two permissible views of the weight of evidence* is not 'clearly erroneous' " (Emphasis supplied.)

In the case at bar, there is no question of the weight of evidence. The evidence here is all on one side of the scale; on the other side, there is none.

The Court of Appeals of the Second Circuit, apparently as a matter of settled policy, has indicated in a long line of decisions that it will not review the weight of evidence: *Petterson Lighterage* v. *New York Central,* 126 F. (2) 992, 994-5; *Crane* v. *Evans Transportation Co.,* 155 F (2) 940, 941; *Fodera* v. *Booth Shipping Corp.,* 159 F. (2) 795, 797; *Roberts* v. *United States,* 186 F. (2) 1005, 1006; *Kilgust* v. *United States,* 191 F. (2) 69.

This position is in sharp contrast to and conflict with that of the Court of Appeals of at least one other Circuit. In *State Farm Mutual Auto Insurance Co.* v. *Bonacci,* 111 F. (2) 412, that Court stated:

> "'Under the new practice, where findings are made by the Court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them but *may set them aside if against the clear weight of the evidence.* * * *'" (Emphasis supplied.)

In pursuing its policy, the Court of Appeals of the Second Circuit has even gone so far as to refuse to follow this Court's holding in *Chesapeake & Ohio* v. *Martin, supra.* In doing so, the Court argued (*Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F. (2) 377; *Golden Eagle* v. *Approved Dehydrating*, 147 F. (2) 359, 360), that what it described as the "so-called 'uncontroverted testimony'" rule does not mean what the opinion of this Court plainly and explicitly states to be the law.

The Courts of Appeals in the other Circuits have accepted and followed the mandate of this Court in the *Chesapeake & Ohio* case: *National Labor Relations Board* v. *McGough Bakeries*, 153 F. (2) 420, 425 (5 Cir.); *Alabama Trust Co.* v. *Millsap*, 71 F. (2) 518, 520 (5 Cir.); *Stillwell* v. *Hertz Drivurself*, 174 F. (2) 714, 717 (3 Cor.); *Grace Bros.* v. *Commissioner of Internal Revenue*, 173 F. (2) 170, 174 (9 Cir.); *Nicholas* v. *Davis*, 204 F. (2) 200, 202 (10 Cir.); *Nicholas* v. *Timpte*, 216 F. (2) 434, 436 (10 Cir.); *San Francisco Association* v. *Industrial Aid*, 52 F. (2) 532, 536 (8 Cir.); *Twentieth Century-Fox Film Corporation* v. *Duckhaus*, 153 F. (2) 893, 899-900 (8 Cir.).

The position thus taken by the Second Circuit is the more difficult to understand in view of its very effective statement of the danger of making a District Judge the final arbiter on questions of fact. In the *Broadcast Music* case, *supra*, that Court wrote:

> "Without doubt, the result of our procedure is to vest the trial judge with immense power *not subject to correction even if misused*: His estimate of an orally testifying witness' credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying;* but unless the judge reveals of record that he used such an irrational test of credibility, *an upper court can do nothing to correct his error.* We thus have what Tourtoulon called the 'sovereignty' of the trial judge." (Emphasis supplied.)

This confession of judicial impotence to correct an error, when the error happens to be one of fact, is wholly out of line with the genius and spirit of our laws as it is with the decisions of this Court and of other Courts of Appeal.

The so-called "two-court rule" which is cited has no conceivable application to the situation here. That rule is applied to cases where *on conflicting evidence,* the lower courts have concurred in a decision. It does not apply to a case such as here where there is no conflict in evidence. Indeed, in the *Chesapeake & Ohio* case, *supra,* the judgment based on a jury's verdict, *had been concurred in by the two lower courts.* Nevertheless, this Court, on review, reversed.

Quescia v. *United States,* 289 U. S. 466, 468.

Nor is it true that this Court will not reverse on questions of fact even where two courts concurred. In the very passage from *United States* v. *Yellow Cab Co., supra,* quoted in respondent's brief, Mr. Justice Jackson said, "of course, it would be our duty to correct clear error, *even in findings of fact*". (Emphasis supplied.)

Clear error is unquestionably present in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM M. FISCH,
Attorney for Petitioner,
No. 225 Broadway,
Borough of Manhattan.
City of New York.

ARTHUR HUTTER,
SAMUEL FRIEDLANDER,
Of Counsel.

(13015)